Office-Supreme Court, U.S.
FILED
AUG 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2186

In The

Supreme Court of the United States

October Term, 1981

JOHN E. BOYD,

Petitioner,

vs.

WESTERN ELECTRIC, A CORPORATION, JOHN D. DEBUTTS and THEODORE G. CLARK,

Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari was filed within the time required by 28 U.S.C. §2101(c).

2. Whether the court of appeals properly affirmed the district court's grant of respondents' motion for summary judgment on petitioner's claim of unlawful termination of employment.

3. Whether the court of appeals properly affirmed the district court's denial of leave to amend.

4. Whether the court of appeals properly affirmed the district court's grant of respondents' motion for summary judgment on petitioner's claim under the Age Discrimination in Employment Act.

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OPINIONS BELOW

Respondents respectfully submit that the opinions below are adequately identified in the petition (PA23-51).[1] However, because petitioner has failed to include certain critical portions of those decisions respondents submit herewith a supplementary appendix.

JURISDICTION

Respondents respectfully submit that the facts relating to this Court's jurisdiction are adequately set forth in the petition. However, as shown *infra*, respondents respectfully submit that this Court is without jurisdiction to entertain the petition because it was not filed in a timely fashion.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES

Constitutional Provisions

Respondents respectfully submit that, contrary to the petition, no constitutional provisions are involved in this appeal.

Statutes

The Age Discrimination in Employment Act, 29 U.S.C. §621, *et seq.* (hereinafter the "ADEA"), §626(d) states in relevant part:

> "No civil action may be commenced by an individual under this section until the individual

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1. "PA" refers to petitioner's appendix; "RA" to respondents' supplementary appendix.

> has given the Secretary not less than 60 days' notice of an intent to file such action. Such notice shall be filed — (1) within 180 days after the alleged unlawful practice occurred. . . ."

29 U.S.C. §633(b) of the ADEA states in relevant part:

> "In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of 60 days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated. . . ."

The Judicial Code and Judiciary Act, 28 U.S.C. §2101(c) states:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action suit or proceeding before the Supreme Court shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Rules

Fed. R. Civ. P. 9(b) states:

> "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

Fed. R. Civ. P. 15(a) states:

> "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . ."

Fed. R. Civ. P. 56(b) states:

> "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his favor as to all or any part thereof."

STATEMENT OF THE CASE

Petitioner John E. Boyd (hereinafter "petitioner") has filed six lawsuits relating to his separation from employment with Western Electric Company, Incorporated (hereinafter "Western") and events leading up to that separation.[2] In all of the suits Western has been a defendant.[3] All six actions have been dismissed by the trial court and petitioner has prosecuted appeals from these dismissals.[4] Petitioner now seeks to have this

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2. Pursuant to Sup. Ct. Rule 28.1, Western Electric Company, Incorporated, states that it is a wholly-owned subsidiary of the American Telephone and Telegraph Company.

3. Western Electric Company, Incorporated, and Theodore G. Clark are hereinafter referred to collectively as "respondents." Respondents note, pursuant to Sup. Ct. Rule 34.1(b), that Mr. deButts, although named as a defendant in the original complaints in the two cases here involved, was not named as a defendant in later amended complaints and is not, therefore, a party to this appeal.

4. The six actions filed by petitioner, designated *Boyd I* through *VI* for the convenience of the Court, and their status are as follows:

Boyd I — *Boyd v. Western Electric, John D. deButts, Lester T. Newill and Bethuel J. Haycock*, U.S.D.C. No. 75-2042 [dismissal affirmed *Boyd v. Western Electric, et al.*, 562 F.2d 41 (3d Cir. 1971); petitioner failed to properly file a Notice of Appeal with the Supreme Court of the United States despite of an extension of time to file granted by Justice Brennan on 12/9/77].

Boyd II — *Boyd v. Western Electric, John D. deButts, Donala Procknow and Lester T. Newill*, New Jersey Superior Court No. L-43916-75 (petitioner's appeal dismissed by the New Jersey Supreme Court in an unreported order, Docket No. 17,405, on 10/14/80).

(Cont'd)

Court review the decision of the United States Court of Appeals for the Third Circuit affirming the dismissal of his complaints in two cases, *Boyd IV* and *Boyd V*.

As the district judge found (PA35), the essential facts in *Boyd IV* and *V* are that on August 9, 1973, petitioner, who had been employed by Western at its facility in Kearny, New Jersey, was given an opportunity by Western to sign an application for Western's Special Early Retirement Program (S.E.R.P.). On August 10, 1973, petitioner signed an application for special early retirement on which he wrote: ". . . this form has been signed under deliberate pressure from Mr. Newill and Mr. Cuthbertson to sign or be terminated." In his complaints,

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(Cont'd)

Boyd III — *Boyd v. Western Electric, Lester T. Newill, John D. deButts and Donald Procknow*, New Jersey Superior Court No. L-40247-76 (petitioner's appeal dismissed by the New Jersey Supreme Court in an unreported order, Docket No. 17,405, on 10/14/80).

Boyd IV — *Boyd v. Western Electric, John D. deButts and Theodore G. Clark*, U.S.D.C. No. 76-2427 (dismissal of petitioner's complaint affirmed by the United States Court of Appeals for the Third Circuit in an unreported decision, No. 79-1753, on 12/8/80).

Boyd V — *Boyd v. Western Electric, John D. deButts, and Theodore G. Clark*, U.S.D.C. No. 76-2470 (dismissal of petitioner's complaint affirmed by the United States Court of Appeals for the Third Circuit in an unreported decision, No. 79-1754, on 12/8/80).

Boyd VI — *Boyd v. Western Electric*, U.S.D.C. No. 76-3693 (in unreported Memorandum Orders dated June 19 and July 24, 1980, petitioner was enjoined from instituting further vexatious litigation in the federal courts and Western was awarded costs and attorneys fees; an appeal is presently pending before the Third Circuit, No. 80-2677).

petitioner asserted that this application for special early retirement was not legally effective because it was signed "under duress."

In *Boyd IV* the district judge granted respondents' motion for summary judgment and dismissal of the complaint in a memorandum opinion on February 14, 1979 (PA23). The district judge found there was no question but that petitioner was, in effect, discharged from his employment with Western. He concluded that petitioner's allegations of "duress" relating to the early retirement agreement did not establish that the termination was improper. "[T]he 'duress' evaporates when it is understood that because his employment was at will his employer had the right to terminate him at any time. He was giving up no rights whatever." (PA35-37).

The district judge in his decision in *Boyd IV* noted that "[t]he law of New Jersey is clear that a private employer may terminate an employee at any time and for any reason so long as no statutory, contractual, or constitutional right is thereby violated." The district judge also found that petitioner had failed to present facts in rebuttal to respondents' summary judgment motion so as to raise "a genuine issue of material fact." Accordingly, he concluded that respondents were entitled to judgment as a matter of law under Fed. R. Civ. P. 56(b) (PA39-40).[5]

In *Boyd V*, at a hearing held on March 27, 1978, the district judge granted respondents' motion for partial summary

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5. In the alternative, the district judge found that the decision in petitioner's state court suits, *Boyd II* and *III*, had addressed precisely the same issues as were raised in *Boyd IV*, *viz.*, the legality of petitioner's termination. In light of the state court's prior dismissal of these claims, the district judge concluded that petitioner's claim was barred under principles of *res judicata*.

judgment on the ground that an identical claim under the ADEA had been dismissed in petitioner's first suit against respondents *Boyd I* (RA1-3).[6]

Subsequently, in *Boyd V* the district judge denied petitioner's motion for leave to file a third amended complaint. In a memorandum opinion on February 14, 1979, the district judge found that petitioner had acted in bad faith in submitting the proposed amended complaint some eight months after he was granted permission to attempt to amend and after the pretrial conference (PA24-34).[7]

On appeal the United States Court of Appeals for the Third Circuit affirmed, in a single judgment order, the decisions in *Boyd IV* and *V* (PA50-51). More specifically, with respect to the grant of respondents' motions for summary judgment on petitioner's claims under the ADEA and for wrongful discharge and with respect to the district court's refusal to grant leave to amend the court of appeals stated:

> "We find no disputed issue of fact and no legal error in the grant of summary judgment, and no abuse of discretion in refusing to permit further amendments." (PA51).

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6. Petitioner did not raise this issue in his notice of appeal to the Third Circuit. Nevertheless, the Third Circuit permitted petitioner to address the issue in the *Boyd V* appeal (PA51).

7. As an alternative ground for denying leave to amend, the district judge found that the amended complaint was defective and would not be able to withstand a motion to dismiss. In this regard, the court examined each of petitioner's allegations of fraud and found that they did not allege the circumstances constituting fraud with particularity as required by Fed. R. Civ. P. 9(b) (PA30-34).

Petitioner now asks this Court to grant a writ of certiorari to review the judgment of the Third Circuit. Respondents submit this brief in opposition to that petition.

SUMMARY OF ARGUMENT

This Court is without jurisdiction to entertain the petition because it was not filed within 90 days of the entry of the judgment below as required by 28 U.S.C. §2101(c). Petitioner's filing, within that 90 day period, of a brief not in conformance with the Supreme Court's Rules does not satisfy the jurisdictional prerequisites established by Congress. Even if Sup. Ct. Rule 33.7 does create an exception for improper but timely petitions, petitioner's failure to promptly substitute a corrected petition precludes application of that exception in this case.

Further, even if the Court had jurisdiction to entertain the petition, it should not be granted. Petitioner has failed to identify issues of law which would, under Sup. Ct. Rule 17, justify the grant of a writ of certiorari. Rather, his petition seeks to have this Court create exceptions to well established principles which the district court applied in granting respondents' motions for summary judgment and in denying petitioner leave to file a third amended complaint.

ARGUMENT

I.

The petition for a writ of certiorari was not filed within the time required by 28 U.S.C. §2101(c).

Pursuant to the provisions of 28 U.S.C. §2101(c), a petition for a writ of certiorari in a civil proceeding must be filed within 90 days of the entry of judgment. In the present action, the judgment order of the United States Court of Appeals for the Third Circuit was entered on January 7, 1981 (PA50-51). To be timely, a writ of certiorari must have been filed by April 7, 1981.

Although, a petition for a writ of certiorari was submitted by petitioner on March 4, 1981, it was rejected by the Clerk as not in conformance with the Supreme Court Rules.[8] A new petition was not filed and served until June 25, 1981, more than 90 days after the entry of judgment by the court of appeals.[9] As such, the petition was not timely filed and for that reason should be denied.

Congress has set the time for invoking the Court's jurisdiction in civil cases and, as this Court has recognized, a petition for certiorari must be denied when it is not filed within the time provided by law. As explained by Justice Harlan in his concurring opinion in *Schacht v. United States*, 398 U.S. 58, 68-69 (1970):

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8. Petitioner's nonconformance with the rules cannot be excused by his *pro se* status. Not only has petitioner pursued actions in state and federal court at the trial appellate levels, he previously attempted to appeal a decision to this Court in 1977.

9. While 28 U.S.C. §2101(c) allows a justice upon request to extend the time to apply for a writ of certiorari, no such application was filed here.

> "As a matter of statutory interpretation, the Court has not presumed the right to extend time limits specified in statutes where there is no indication of a congressional purpose to authorize the Court to do so. Because we cannot 'waive' congressional enactments, the statutory time limits are treated as jurisdictional."

See Deal v. Cincinnati Board of Education, 402 U.S. 962 (1971); *Department of Banking v. Pink,* 317 U.S. 264 (1942).

Supreme Court Rule 33.7 should not be applied in this case to excuse petitioner's failure to comply with the statutory time limitation.[10] Petitioner did not "promptly substitute" corrected copies of his petition as required by Rule 33.7. In fact, a new petition was not submitted until nearly four months after the initial petition. Under all of these circumstances, the petition should be denied because it was not timely filed.

II.

The court of appeals did not depart from well established principles in affirming the grant of respondents' motion for summary judgment on petitioner's claim of wrongful termination of employment.

The function of the trial court and the appellate court with respect to Fed. R. Civ. P. 56 is clear. As stated in *Landtect Corporation v. State Mutual Life Assurance Company of America,* 605 F. 2d 75, 79 (3d Cir. 1979), *quoting Goodman v. Mead Johnson & Co.,* 534 F. 2d 566, 573 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977):

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10. Respondents respectfully submit that Rule 33.7 should not apply under any circumstances to excuse the failure to comply with the time limitation for filing a petition for certiorari which as been set by Congress.

> "Rule 56 [Fed. R. Civ. P.] allows the trial court to grant summary judgment if it determines from its examination of the allegations in the pleadings and any other evidential source available that *no genuine issue as to a material fact remains for trial,* and that the moving party is entitled to judgment as a matter of law . . . *On review the appellate court is required to apply the same test* the district court should have utilized initially. Inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion. The nonmovant's allegation must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt."

And see, Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); 6 *Moore's Federal Practice*, ¶56.15.

Here, the district judge properly found that the only issue presented by respondents' summary judgment motion in *Boyd IV* was whether Western had the right to terminate petitioner's employment in 1973.[11] Under the law of New Jersey,

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11. While petitioner contends that the courts below misunderstood the issue and that he was not actually terminated (Petition, p. 23), the district court noted that petitioner's deposition testimony and petitioner's own contemporaneous notation on the S.E.R.P. agreement indicate that he was faced with the alternatives of signing or being terminated (PA35, 53). The only difference between what happened to petitioner as a result of his having retired under S.E.R.P. and what would have happened had he been terminated without the benefit of S.E.R.P., is that he received additional benefits by virtue of having signed the S.E.R.P. application. Thus, as the district court found, petitioner gave up no rights by signing the application. Indeed, he actually benefited by accepting special early retirement (PA35-37). Accordingly, the only issue presented by the summary judgment motion was whether such termination was, or was not, lawful.

employment for an indefinite period of time may be terminated with or without cause, at the will of either party, so long as such termination does not violate any constitutional, statutory or contractual provision. *Jorgensen v. Pennsylvania R.R. Co.*, 25 N.J. 541, 554, 138 A. 2d 24, 32 (1958); *Hindle v. Morrison Steel Co.*, 92 N.J. Super. 75, 81, 223 A. 2d 193, 196 (App. Div. 1966). Thus, given petitioner's failure to show any facts which might establish such a limitation on Western's right to terminate his employment, the district court properly granted the motion for summary judgment on petitioner's claim for wrongful discharge.

Similarly, petitioner's theory (Petition, pp. 32-44) that his termination constituted tortious interference with employment was unsupported as a matter of law. Petitioner failed to establish the critical prerequisites to such an action, *i.e.*, that a third party maliciously or without justification interfered with an actual, or reasonably probable, employment relationship. *Brennan v. United Hatters*, 73 N.J.L. 729, 740-43, 65 A. 165, 170-74 (E. & A. 1906); *Louis Schlesinger Co. v. Rice*, 4 N.J. 169, 180, 72 A. 2d 197, 203 (1950). Accordingly, there was no basis for proceeding on a theory of tortious interference with employment. *See Meyer v. Bell & Howell Company*, 453 F. Supp. 801, 802 (E.D. Mo.), *appeal dismissed*, 584 F. 2d 291 (8th Cir. 1978).[12]

In this connection, petitioner (Petition, pp. 32-41) mistakenly places great reliance on *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894 (D.N.J. 1978). He apparently contends

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12. In the alternative, the district court found that the claim presented in the instant action — the lawfulness of petitioner's termination — was previously raised and decided by the New Jersey Superior Court in *Boyd II* and *III*. Given this identity of claims and the fact that Western and its privies were the defendants in both actions, the district judge properly held that the prior dismissal of the claim was a bar to the relitigation of that issue under the doctrine of *res judicata* (PA40-45).

that *Kyriazi* established the rule that professional employees at Western's Kearny facility automatically enjoyed a contract of employment (although such a contract was not agreed to, written, or signed by the parties) and, therefore, could not be discharged without cause. No such rule of law was established in *Kyriazi.* It is readily apparent from a fair reading of the *Kyriazi* opinion that the single, introductory allusion to a contract was used as a shorthand description for an employment relationship.[13]

Petitioner also argues that the lower courts improperly disregarded the public interest in upholding his discharge (Petition, pp. 30-31). This concept was not pleaded in the complaint, and, for that reason alone, should be disregarded. In any event, petitioner's suggestion is without merit.

While a number of jurisdictions have recognized that considerations of public policy may, in certain cases, impose some restraint on an employer's right to terminate an at will employee, none of those limitations are relevant here. *See Davis v. United States Steel Supply, Div. of U.S. Steel Corp.*, 581 F. 2d 335, 340 (3d Cir. 1978); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A. 2d 505 (1980). The public interests raised by petitioner — loss to the government of income tax and

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13. The district court in *Kyriazi* made no specific finding that Kyriazi had an employment contract, or that any employment contract had been breached. Rather, it held that Kyriazi was entitled "to recover under the tort of malicious interference with her employment at Western." *Kyriazi, supra,* at 950. Further, as the *Kyriazi* court's reference to *Brennan v. United Hatters of North America, Local No. 17, supra,* 73 N.J.L. 729 and *Raymond v. Cregar,* 38 N.J. 472, 185 A. 2d 856 (1962) indicates, the finding was based on the tort of malicious "interference with an *employment relationship.*" *Kyriazi, supra,* at 950 (emphasis added). Finally, there are no specific findings of fact supporting the court's reference to an "employment contract," and the existence of such a contract was in no way material to that case.

adverse impact on social security funds — would apply when any employee is terminated and are so broad as to be obviously outside the scope of any possible exception.

Petitioner also raises claims of constitutional violations (Petition, pp. 19-23) never pleaded in the district court in this case. This attempt to litigate new issues on appeal is entirely improper and should be rejected. Moreover, the claims are without merit. Petitioner's discharge by Western, a private employer, does not contravene federal constitutional guarantees of due process, equal protection or right to contract.

In sum, the petition points to no constitutional, contractual or statutory provisions which would have rendered unlawful a decision by Western to terminate petitioner. Under the applicable case law, Western was entitled to terminate petitioner as it saw fit. Petitioner's claim that his separation from Western was somehow actionable is, therefore, as the courts below found, unsupported as a matter of law.

III.

The court of appeals properly affirmed the district court's denial of leave to amend this complaint.

The legal principles which govern the decision here have been well established by this Court and the federal courts generally for many years. In general, the grant or denial of a motion for leave to amend, pursuant to Fed. R. Civ. P. 15(a), is within the sound discretion of the district court; it will be reversed only for an abuse of discretion. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Cornell & Co., Inc. v. Occupational Safety and Health Review Commission*, 573 F. 2d 820, 823 (3d Cir. 1978).

Rule 15(a) directs that leave to amend "shall be freely given", however, it is limited to situations "when justice so requires." Thus, it is well established that undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or futility of amendment are grounds for denying leave to amend. *Foman v. Davis, supra,* 371 U.S. at 182; *Albee Homes, Inc. v. Lutman,* 406 F. 2d 11, 13-14 (3d Cir. 1969); *Cornell v. Occupational Review Commission, supra,* 573 F. 2d at 823; 3 *Moore's Federal Practice,* ¶15.08[4].

In *Boyd V,* despite petitioner's repeated failure to cure deficiencies in his complaint by prior amendments, the district judge granted petitioner a third opportunity to amend his complaint as to fraud in conformance with Fed. R. Civ. P. 9(b) (PA24, 27-28). However, the third amended complaint eventually submitted by petitioner did not comply with the conditional leave to amend granted by the district judge (PA26-28).[14] The third amended complaint, which was to deal only with the allegations of fraud, contained three completely new counts and, in the count relating to fraud, nineteen new "items" never previously raised (PA26, 31). Because the amended complaint did not comply with its previous order, the district court viewed petitioner's application as a new motion for leave to file an amended complaint (PA27-28).

The district court found that petitioner's third amended complaint had not been submitted until eight months after the

14. Such a conditional grant of leave to amend was proper. As stated in 6 Wright & Miller, *Federal Practice and Procedure,* §1486 at p. 424 (1974): "The statement in Rule 15(a) that 'leave shall be freely given when justice so requires' presupposes that the court may use its discretion to impose conditions on the allowance of a proposed amendment as an appropriate means of balancing the interests of the parties seeking the amendment and those of the party objecting to it." *See also,* 3 *Moore's Federal Practice,* ¶15.08[6] ("It is within the court's discretion to allow an amendment on terms").

previous complaint had been dismissed and after the scheduled pretrial conference (PA25; RA5-6). At that point over two years had elapsed since the suit was commenced; over five years had passed since the events underlying the complaint had occurred (PA28). Under these circumstances, the district court's findings of undue delay and prejudice to respondents were proper and fully justified the denial of leave to amend.[15] *Albee Homes, Inc. v. Lutman, supra,* 406 F. 2d at 13-14; *Nevels v. Ford Motor Co.,* 439 F. 2d 251, 257 (5th Cir. 1971).

Petitioner argues (Petition, p. 44) that the third amended complaint was actually the first amended complaint and was, therefore, to be permitted as of right under Rule 15(a). Petitioner's argument ignores that he was twice permitted to amend his complaint. In both instances those amended complaints were dismissed by the court.[16] Thus, petitioner was permitted to amend his complaint not once, but twice, and was given a third opportunity which he forfeited through his own delay and bad faith.[17]

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15. As noted by the district judge, while petitioner proceeded *pro se,* he is not an unintelligent man, had been assisted by judges of the federal and state courts and was a student at a New Jersey law school (RA5).

16. The dismissal of those first two amended complaints is not an issue before the Court.

17. In the alternative, the district judge found, after reviewing each of the allegations of fraud, that the elements of fraud were not pleaded with specificity as required by Fed. R. Civ. P. 9(b) (PA30-40). *See Ross & Ross v. A.H. Robins Co., Inc.,* 607 F. 2d 545 (2d Cir.), *cert. denied,* 446 U.S. 946 (1979); *Cramer v. General Telephone & Electronics Corporation,* 582 F. 2d 259, 272 (3d Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979).

IV.

The court of appeals properly upheld the district court's grant of summary judgment on petitioner's ADEA claim.

Petitioner in his initial complaint in *Boyd V* alleged that respondents violated the ADEA in terminating his employment. The district court, noting that the identical claim had been dismissed with prejudice in *Boyd I*, held that petitioner was barred from again raising this claim under principles of *res judicata*.

Petitioner does not now argue that his claim was improperly barred. Rather, he asserts that the initial decision to dismiss his claim in *Boyd I* was incorrect (Petition, pp. 26-31). That earlier decision, which was affirmed by the United States Court of Appeals for the Third Circuit in 1977 [*Boyd v. Western Electric Co., Inc.*, 562 F. 2d 41 (3d Cir. 1977)] and which petitioner unsuccessfully attempted to appeal to this Court, should not be disturbed.

As recently explained by this Court in *Federated Department Stores, Inc. v. Moitie and Brown*, 49 U.S.L.W. 4687, 4689 (June 15, 1981):

> "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877). Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Angel v. Bullington*, 330 U.S. 183,

187 (1947); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887). As this court explained in *Baltimore Steamship Company v. Phillips*, 274 U.S. 316, 325 (1927), an 'erroneous conclusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata* . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action.' We have observed that 'the indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Reed v. Allen*, 386 U.S. 191, 201 (1932).

The facts in this case warranted application of the doctrine of *res judicata*. The parties or their privies took part in *Boyd I* and *V* and the identical claim was presented in both cases. Under these circumstances the lower courts properly held that petitioner's ADEA claim was barred.[18]

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18. A brief review of petitioner's argument indicates that the prior dismissal of the ADEA claim in *Boyd I* was proper. Petitioner relies on *Holliday v. Ketchum, McLeod and Grove, Inc.*, 584 F. 2d 1221 (3d Cir. 1978). However, as the Third Circuit recognized, prior to its decision in the instant matter, *Holliday* was overruled *sub silentio* in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). *See Marshall v. Chamberlain Manufacturing Corp.*, 601 F. 2d 100, 100-101 (3d Cir. 1979). The decision in *Boyd I* to dismiss the ADEA claim because of petitioner's failure to notify the Department of Labor of his intent to sue and because of his failure to provide the state agency with notice of his discrimination claim 60 days prior to instituting suit is not inconsistent with *Oscar Mayer*.

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

SEBASTIAN J. FORTUNATO
Counsel for Respondents
PITNEY, HARDIN, KIPP
& SZUCH

Of Counsel:

BYRNE F. MARTIN,
WESTERN ELECTRIC COMPANY,
INCORPORATED

APPENDIX

EXCERPTS OF UNITED STATES DISTRICT COURT HEARING DATED MARCH 27, 1981

UNITED STATES DISTRICT COURT

JOHN E. BOYD,

Plaintiff,

v.

WESTERN ELECTRIC, et al.,

Defendant.

BEFORE: The Honorable FREDERICK B. LACEY, U.S.D.J.

Appearances:

JOHN E. BOYD,
Pro Se.

PITNEY, HARDIN & KIPP
BY: EDWARD P. LYNCH, ESQ.
and MYLES C. MORRISON, III, Esq.
For the Defendants.

MOTION

TRANSCRIPT OF PROCEEDINGS
March 27, 1978

[Commencing at page 17]

Excerpts of United States District Court Hearing Dated March 27, 1981

* * *

"MR. LYNCH: Your Honor, we have moved for dismissal or summary judgment in both cases before you. The first point I think perhaps to be taken up involves number 2470 which is a 9-count complaint. Count 3 of that complaint pleads a violation of the Age Discrimination Act —

THE COURT: Wait a minute. Count 3?

MR. LYNCH: Count 3, yes.

THE COURT: All right. I have it.

MR. LYNCH: That matter, your Honor, I think is barred by the doctrine of res judicata. That was dismissed in the prior district court action and that was affirmed by the Third Circuit. So I think res judicata is a bar to Count 3 of this case.

Count 4 pleads what is arguably —

THE COURT: Wait just a minute. Let me get Judge Meanor's opinion out.

Where did he deal with that? At what point?

MR. LYNCH: I think the bulk of his opinion dealt with that question, your Honor.

Beginning at page 4, I think.

Excerpts of United States District Court Hearing Dated March 27, 1981

THE COURT: All right. What about that fact that Mr. Lynch has pointed out, how do you handle that, Mr. Boyd?

MR. BOYD: Well, that's one of the points being appealed in this Supreme Court case. I feel that the 180-day requirement was not meant to be jurisdictional by Congress when they passed the ADEA and —

THE COURT: All right. I'm going to grant the motion as to Count 3 on res judicata grounds."

* * *

EXCERPTS OF UNITED STATES DISTRICT COURT MEMORANDUM OPINION DATED FEBRUARY 14, 1979

UNITED STATES DISTRICT COURT

JOHN E. BOYD,

Plaintiff,

vs.

WESTERN ELECTRIC, a corporation and THEODORE G. CLARK,

Defendants.

BEFORE: The Honorable FREDERICK B. LACEY, U.S.D.J.

Appearances:

JOHN E. BOYD,
Pro Se.

MESSRS. PITNEY, HARDIN & KIPP
BY: EDWARD P. LYNCH, ESQ.
and MYLES C. MORRISON, III, ESQ.
For the Defendants.

MEMORANDUM OPINION
February 14, 1979

[Commencing at page 4]

Excerpts of United States District Court Memorandum Opinion Dated February 14, 1979

"THE COURT:

* * *

In the first place, it is clear to me that the plaintiff has failed to proceed in good faith in that he has waited until after the pretrial conference was held in these cases to file his amended complaint. To deal with it, if we were to deal with it at all on its merits, further discovery would have to take place with a resultant delay in the trial and another pretrial conference would have to be held and the matter reset on the trial calendar.

While the plaintiff is a pro se litigant, he is not an unintelligent man, as the record will reflect. He had been in this court in several other actions as well as an active litigant in the State Court. He has had the assistance of not only this court but of other judges in this court and in the State Court to the extent that he has been given assistance and direction in pursuing his litigation.

Additionally, as has been noted, he is also a student at one of the New Jersey law schools.

He could hardly expect to be permitted to file an amended complaint some eight months after being given permission to do so when, as I have noted, that filing comes after the date of the pretrial conference.

Excerpts of United States District Court Memorandum Opinion
Dated February 14, 1979

* * *

As I have noted, in December counsel were notified and pro se plaintiff was notified of pretrial and trial dates."